

FOOD MAIL SECTION

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
GTE Telephone Operating Companies)	Transmittal Nos. 909, 918
)	
Revisions to Tariff F.C.C. No. 1)	CC Docket No. 94-81
)	
)	

SUPPLEMENTAL DESIGNATION ORDER

Adopted: August 14, 1995; Released: August 14, 1995

Supplemental Direct Case Due: August 28, 1995

Supplemental Oppositions Due: September 11, 1995

Supplemental Rebuttals Due: September 18, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 22, 1994, GTE Telephone Operating Companies (GTOC), on behalf of the General Telephone Company of California (GTECA), filed Transmittal No. 873 to establish video channel service for Apollo CableVision, Inc. (Apollo), a cable company providing cable service in Cerritos, California. On that same day, GTOC also filed Transmittal No. 874 to provide this same service to an affiliated company, GTE Service Corporation (Service Corp.). Prior to that time, GTECA had been providing video channel service to Service Corp. pursuant to a five-year waiver of the cable-telephone cross-ownership ban¹ and a Section 214

¹ Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

authorization granted in 1988.² GTOC stated that it submitted Transmittal 874 to enable Service Corp. to continue providing cable service to Cerritos subscribers after the waiver expired on July 17, 1994.³

2. On July 14, 1994, the Common Carrier Bureau (Bureau) suspended Transmittal 873, and initiated an investigation into various issues raised by this tariff filing.⁴ In the same Order, we found that Transmittal 874 violated the Communications Act and the Commission's rules prohibiting telephone common carriers from engaging in the provision of video programming, and, accordingly, we rejected Transmittal 874.⁵ The United States Court of Appeals for the Ninth Circuit later stayed the Cerritos Tariff Order "insofar as it rejects Transmittal 874."⁶ On September 9, 1994, GTOC filed Transmittal No. 909 to add to its tariff the material it removed in response to the rejection of Transmittal 874. Thus, Transmittals 909 and 874 were identical. The Bureau concluded that Transmittal 909 raised substantial questions of lawfulness, suspended the tariff for one day, imposed an accounting order, and included Transmittal 909 in the pending investigation of Transmittal 873.⁷

3. In GTE v. FCC, the Court of Appeals held that GTECA's Section 214 authority for Transmittal 909 expired with the expiration of the cross-ownership waiver.⁸ On July 28, 1995,

² General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (Waiver Review Order).

³ Transmittal No. 874, Description and Justification (D&J) at 1.

⁴ GTE Telephone Operating Companies, CC Docket No. 94-81, 9 FCC Rcd 3613 (Com.Car.Bur. 1994) (Cerritos Tariff Order) (applications for review pending).

⁵ Id. at 3615 (para. 16). See Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

⁶ GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed Sept. 7, 1994).

⁷ GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 909, CC Docket No. 94-81, 9 FCC Rcd 5229 (para. 3) (Com.Car.Bur., 1994) (Transmittal 909 Suspension Order); citing Cerritos Tariff Order, 9 FCC Rcd at 3615 n.38. The Bureau decided to act on Transmittal 909 before the end of the 60 day transition period on September 12, to avoid a conflict between the Court's stay order and the Cerritos Tariff Order. If we had acted on Transmittal 909 after September 12, the programming service provided by Service Corp. might have been disrupted. Therefore, we acted on Transmittal 909 without waiting for interested parties to file petitions to reject or suspend and investigate GTECA's filing.

⁸ GTE California, Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994) (GTE v. FCC). GTECA subsequently filed a petition for rehearing before the Court of Appeals, and that petition was denied on May 19, 1995. GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed May 19,

GTECA submitted a request for Section 214 authorization for the facilities it uses to provide video channel service to GTE Service Corp. in Cerritos, stating that it would be necessary for it to cease providing this service to GTE Service Corp. without this authorization. GTE requested that its application be granted on an expedited basis.⁹

4. On the same day that GTECA filed its request for Section 214 authorization, the Bureau issued an Order directing GTOC either to apply for Section 214 authority within 15 days of the release date of that Order, or to notify us within that period that it intended to remove from its tariff the service it introduced in Transmittal 909, and to do so within 60 days of the release date of the same Order.¹⁰ We stated that, if GTOC sought Section 214 authority, we would grant GTOC temporary Section 214 authority to provide video channel service to Service Corp. while its application is pending, and discuss the need to designate additional issues for investigation of Transmittal 909 in a subsequent Order.¹¹ By its submission on July 28 of a request for a permanent Section 214 authorization, GTE has complied with the Bureau's Order of the same day.¹² Accordingly, we hereby grant GTOC temporary authority to continue to provide video channel service to Service Corp. while its application for a permanent Section 214 authorization is pending. In addition, we designate one additional issue for investigation below.

1995). We recognized that courts have held that the cable-telephone cross-ownership rule unconstitutionally restricts LECs' rights under the First Amendment. GTE Telephone Operating Companies, CC Docket No. 94-81, DA 95-1679 (Com. Car. Bur., 1995) (Cerritos Section 214 Order), para. 4, citing GTE South, Inc. v. United States, No. 94-1588-A, (E.D. Va., Jan. 13, 1995); Chesapeake and Potomac Telephone Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994) (C&P v. United States); US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994) (US West v. United States). Because GTECA does not have valid Section 214 authorization for the transmission service offered under Transmittal 909, however, we concluded that these Courts' holdings do not affect this investigation. Cerritos Section 214 Order, para. 4. See also GTE v. FCC, 39 F.3d at 945-47 (as a result of the expiration of GTECA's Section 214 authority, the Court did not need to reach the constitutionality issue in that case).

⁹ Cerritos Section 214 Order, para. 4, citing Letter from Whitney Hatch, GTE, to Secretary, FCC, July 28, 1995.

¹⁰ Cerritos Section 214 Order, para. 5.

¹¹ Cerritos Section 214 Order, para. 5.

¹² Application of GTE California Incorporated for Authority pursuant to Section 214 of the Communications Act, as amended, to continue the provision of video channel service to an affiliate in Cerritos, California and for temporary authority pursuant to Section 63.04 of the Commission's Rules, filed July 28, 1995. See also Letter for Whitney Hatch, GTE, to Chief, Common Carrier Bureau, August 2, 1995.

5. The Bureau observed in the Transmittal 909 Suspension Order that it was not necessary to reach many of the issues raised by parties petitioning to reject or suspend and investigate Transmittal 874.¹³ In this Order, we discuss the issues raised by petitioners regarding Transmittal 874 that we did not address in the Cerritos Tariff Order. On the basis of that record, we designate issues pertaining to Transmittal 909 to add to the pending Cerritos tariff investigation, and establish a pleading cycle.¹⁴

II. BACKGROUND

6. In 1988, GTECA sought authority, pursuant to Section 214 of the Communications Act, as amended (Act), 47 U.S.C. § 214, to construct and maintain a 78-channel cable network in Cerritos, California. The intended customers of the service offering were Apollo Cablevision (Apollo), the cable franchisee in Cerritos, and Service Corp.¹⁵ GTECA contracted with Apollo's parent company, T.L. Robak, Inc. (Robak), to construct the network. The Bureau found that the construction contract between GTECA and Robak would create a relationship between the two other than a "carrier-user relationship," and thus GTECA's proposal would violate the cable-telephone cross-ownership rules and the Cable Act of 1984.¹⁶ Nevertheless, the Bureau found good cause to grant GTECA a limited waiver of the cross-ownership rules and Section 214 authority.¹⁷ On review, the Commission vacated the Bureau's Order, but reinstated GTECA's waiver subject to additional conditions. Specifically, the Commission limited the waiver to five years from the release date of the Order, which period expired on July 17, 1994.¹⁸

7. The National Cable Television Association (NCTA) sought judicial review of the Commission's decision to authorize the Cerritos system and to waive the cross-ownership rules. The Court found that there was good cause for grant of a waiver of the cross-ownership rules to permit Service Corp. to conduct the authorized tests, but remanded the case to the Commission because the Commission had not adequately explained why it was necessary for

¹³ Transmittal 909 Suspension Order, 9 FCC Rcd at 5229 (para. 3).

¹⁴ For the purposes of this Order, we refer to Transmittal 874 and Transmittal 909 interchangeably.

¹⁵ General Telephone Company of California, 3 FCC Rcd 2317 (Com.Car.Bur. 1988) (Waiver Order).

¹⁶ Id. at 2319 (para. 20).

¹⁷ Waiver Order, 3 FCC Rcd at 2323 (paras. 37-41).

¹⁸ General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (Waiver Review Order).

GTECA to hire Robak to construct the system.¹⁹ The Court hypothesized that the benefits of the Cerritos system could have been achieved without the cross-ownership waiver if it were possible for GTECA to hire someone other than an affiliate of the cable programming provider for this construction project.²⁰ On remand, the Commission found that it was not necessary for GTECA to hire Robak to build the cable network, and, therefore, rescinded GTECA's cross-ownership waiver and Section 214 authorization.²¹ On January 5, 1994, the Court of Appeals for the Ninth Circuit stayed the effectiveness of the Remand Order pending judicial review.²²

8. Through Transmittal 873, GTECA converted the contractual arrangement with Apollo, established pursuant to the cross-ownership waiver in 1989, to a tariffed common carrier service which it calls "video channel service."²³ GTECA contemplated that Apollo would use this tariffed service to continue to provide cable service to Apollo subscribers. In Transmittal 874, GTECA proposed to provide channel service to its affiliate, Service Corp., which would permit Service Corp. to continue to provide video-on-demand service to subscribers in Cerritos. Video channel service would transmit cable television signals from Apollo's and Service Corp.'s locations to subscribers' homes.²⁴ In Transmittal 874, GTECA stated that the rates, terms, and conditions governing the provision of video channel service to Service Corp. would be identical to those set forth in Transmittal 873 under which service is furnished to Apollo.²⁵ GTECA noted that in 1992, Apollo prepaid its monthly payment obligations under the contract for the remainder of the 15 year contract term. Thus, GTECA concluded that Apollo had already

¹⁹ National Cable Television Ass'n v. FCC, 914 F.2d 285, 288-89 (D.C. Cir. 1990) (NCTA v. FCC).

²⁰ NCTA v. FCC, 914 F.2d at 288-90.

²¹ General Telephone Company of California, 8 FCC Rcd 8178, 8181 (para. 13) (1993) (Remand Order).

²² GTECA also filed a petition for stay of the Remand Order before the Commission, and the Commission denied GTECA's request. General Telephone Company of California, 8 FCC Rcd 8753 (1993) (Stay Order).

²³ Transmittal 873 D&J at 4.

²⁴ Id. at 8.

²⁵ Transmittal 874 D&J at 1.

prepaid for video transmission service through May 2, 2006.²⁶ In Transmittal 909, GTECA filed tariff language that is identical to that rejected in Transmittal 874.²⁷

III. DISCUSSION

9. Four parties, Apollo, MCI Telecommunications Corporation (MCI), NCTA, and the City of Cerritos, California (the City), filed petitions to reject or suspend and investigate Transmittal 874.²⁸ Because the issues raised by Transmittals 874 and 909 are identical, we will consider the arguments concerning Transmittal 874 in designating issues for investigation of Transmittal 909. Since many of the issues posed by Transmittal 909 are similar to those already designated in our investigation of Transmittal 873, we will incorporate the issues posed by Transmittal 909 in that ongoing investigation. In an effort to avoid duplicative pleadings, the parties are instructed to address Transmittal 909 issues in their supplemental direct cases and comments only insofar as distinguishing circumstances are raised by Transmittal 909. In the discussion which follows, we designate for investigation one additional issue which we believe warrant separate submissions by the parties. We also explain our application of the issues addressed in the Cerritos Tariff Order to Transmittal 909.

A. Discrimination

10. Pleadings. According to MCI, GTECA has not adequately shown that the rate Apollo has prepaid is the same as the rate it will charge to Service Corp., because Service Corp. would pay a flat monthly rate until 2006, and Apollo has made a lump-sum payment for the same length of service. MCI maintains that, without this showing, Transmittals 873 and 874 may violate Section 202(a) of the Communications Act.²⁹ Similarly, Apollo implies that GTECA's charges to Service Corp. in Transmittal 909 do not take into account the 18.9 percent interest that was to be paid over 15 years, and argues that the rate in Transmittal 909 should be

²⁶ Id. at 8-9.

²⁷ On October 7, 1994, GTECA filed Transmittal No. 918, to remove references to Service Corp. from Transmittal 909. Transmittal 918 took effect on October 22, 1994. We discuss Transmittal 918 in more detail below.

²⁸ On June 20, 1995, Apollo submitted a supplement to its petition to reject or suspend Transmittal 874 that it filed on May 17, 1994, arguing that GTECA does not have Section 214 authority to provide cable transmission service to Service Corp. The Commission's rules do not make provision for filing supplements to petitions to reject or suspend and investigate tariff filings. See Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773. Accordingly, we will place no weight on Apollo's supplement.

²⁹ MCI Petition at 2-3.

increased to include this interest and to make this rate equivalent to the rate in Transmittal 873.³⁰ GTECA argues that the rate applicable to Service Corp. is equal to Apollo's lump-sum payment if one compares the two, using an 18.9 percent below-the-line, pre-tax cost-of-capital rate, over a 15 year period.³¹

11. Apollo also argues that Transmittal 909 would permit GTECA to discriminate unlawfully in favor of Service Corp. in the provision of maintenance services.³² GTECA denies that it will favor either Apollo or Service Corp. in its provision of channel service.³³ In addition, on October 4, 1994, Apollo submitted an ex parte statement requesting the Bureau to designate for investigation whether there are adequate safeguards in place to protect Apollo from anticompetitive activity by Service Corp.³⁴ Apollo claims that GTECA and Service Corp. agreed in their contracts with Apollo not to compete with Apollo in the provision of video programming. Apollo contends that Transmittal 909 is inconsistent with those contractual agreements.³⁵ Apollo also claims that GTECA's assumption of "certain operational controls" has had an anticompetitive effect on Apollo.³⁶ In another ex parte statement submitted on June 12, 1995, Apollo contends that Service Corp. has attempted to obtain a cable franchise from the City of Cerritos, and has been paying franchise fees to the City. According to Apollo, Service Corp. represents that those franchise fees amount to 2.5 percent of Service Corp.'s gross receipts.³⁷ Apollo then derives Service Corp.'s total monthly gross receipts, and observes that those receipts are substantially less than the rate in Transmittal 909.³⁸ Apollo maintains that

³⁰ Apollo Opposition at 21.

³¹ GTECA Opposition at 23. "Below the line" refers to costs and expenses that are not used in determining net operating income. These costs are not traditionally associated with regulated activities, and therefore excluded from rate regulation.

³² Apollo Petition at 24-25, cited in City Petition at 19-20.

³³ GTECA Reply at 28.

³⁴ Letter from Edward P. Taptich, Counsel for Apollo, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, October 4, 1994 (October 4 Letter) at 2.

³⁵ Id. at 3.

³⁶ Id. at 2. Apollo states that it explains these anticompetitive effects in its reply comments filed in the Transmittal 873 investigation. Id. at 2 n.4

³⁷ Letter from Edward P. Taptich, Counsel for Apollo, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, June 12, 1995 (June 12 Letter) at Attachment.

³⁸ June 12 Letter at 2. Specifically, Apollo calculates Service Corp.'s monthly gross receipts to be \$2841 per month, and compares this with the Transmittal 909 rate of \$81,764. Id. at 2

this is evidence that the Transmittal 909 rate is not a "reasonable market rent," which Apollo contends is required by its contractual arrangements with GTE, and recommends designating an issue for investigation on this subject.³⁹

12. Discussion. We agree with Apollo that the rates in Transmittal 909 should include some interest component, so that Apollo's one-time payment would be equivalent to the rates paid by Service Corp. over time. GTECA argues that the rates charged to Service Corp. and Apollo are equivalent if they are compared using an 18.9 percent cost of capital over 15 years. There is no evidence in the record, however, that 18.9 percent is a reasonable below-the-line, pre-tax cost of capital. In the Cerritos Tariff Order, we directed GTECA to explain why it is reasonable to base the rates in Transmittal 873 on an 18.9 percent interest rate.⁴⁰ To the extent that it is unreasonable to base the rates in Transmittal 873 on this interest rate, it is also unreasonable to base the rates charged under Transmittal 909 on an 18.9 percent interest rate. We therefore designate for investigation whether the rates and terms proposed in Transmittal 909 are reasonable.

13. In addition, GTECA contends that the rates, terms, and conditions governing the provision of video channel service to Service Corp. are identical to those set forth in Transmittal 873, under which service is furnished to Apollo.⁴¹ Based on this, it seems clear that the services provided to Apollo and Service Corp. are like services within the meaning of Section 202 of the Communications Act, 47 U.S.C. § 202. Therefore, GTECA is required to set the rates for the two services are equal after any adjustment to the interest rate that the Commission may require, or demonstrate that any disparity between the two rates is not unreasonable.⁴²

and n.2.

³⁹ Id. at 2.

⁴⁰ Cerritos Tariff Order, 9 FCC Rcd at 3618 (Factual Issue 2). See also Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 9 FCC Rcd 440, 450-51 (para. 25) (1993) (ONA Final Order), in which the Commission concluded that basing rates assuming a cost of money over 11.25 percent was unreasonable for open network architecture rates.

⁴¹ Transmittal 874 D&J at 1.

⁴² The Courts have established a three part test for Section 202: (1) are the services "like;" (2) how much is the disparity in rates, if any, and (3) is that disparity reasonable, or is there any consideration that might justify that disparity. See MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988).

14. Apollo is concerned that Transmittal 909 may permit GTECA to provide unreasonable preferences to Service Corp. relative to Apollo.⁴³ The Commission originally adopted the cross-ownership ban, inter alia, to eliminate LECs' ability to provide unreasonable preferences to cable programming affiliates relative to other cable programmers,⁴⁴ and enforcement of the ban was the reason why we originally rejected Transmittal 874 in the Cerritos Tariff Order.⁴⁵ The Cerritos Tariff Order was stayed "insofar as it rejects Transmittal 874," however, and the cross-ownership ban was found unconstitutional.⁴⁶ Therefore, we conclude that compliance with the cross-ownership ban would not constitute a suitable issue for investigation. Apollo's concerns over discrimination will be dealt with more effectively through the investigation of the specific issues outlined in this Order and the Cerritos Tariff Order.

15. With respect to GTE's agreement not to compete with Apollo, we note that we have already designated for investigation whether it is lawful for GTECA to file tariffs different from its contractual arrangement with Apollo, and the extent to which GTECA's tariff filings are in fact inconsistent with those contractual arrangements.⁴⁷ If Transmittal 909 is not withdrawn, the parties are free to supplement the record to address this provision of the contract, if they so choose. Furthermore, we note that there is a proceeding pending before the Commission's Cable Services Bureau, in which Apollo has argued that it faces "effective competition" from Service Corp. within the meaning of Section 76.905 of the Commission's Rules.⁴⁸ Because the record in that proceeding will be instructive in determining whether GTECA is in fact competing with Apollo, and therefore is acting in a manner inconsistent with the agreement not to compete with Apollo, we conclude that it is not necessary to solicit further comments on this subject here.

⁴³ October 4 Letter at 2-3.

⁴⁴ Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 FCC 2d 307, recon. 22 FCC 2d 746 (1970), aff'd sub nom. General Telephone Company of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971); Waiver Review Order, 4 FCC Rcd at 5697 (para. 33). Congress later incorporated the cross-ownership ban into the Cable Act of 1984. Section 613(b) of the Communications Act, 47 U.S.C. § 533(b).

⁴⁵ Cerritos Tariff Order, 9 FCC Rcd at 3615 (para. 16).

⁴⁶ C&P v. United States, 42 F.3d at 198-202; US West v. United States, 48 F.3d at 1104-06.

⁴⁷ Cerritos Tariff Order, 9 FCC Rcd at 3618 (Legal Issue 2 and Factual Issue 2). Apollo notes that it also discusses its concerns in its reply comments. October 4 Letter at 2 nn.3, 4.

⁴⁸ Apollo Petition for Revocation of Certification to Regulate Basic Cable Rates in Cerritos, California, CA 1450, filed Jan. 23, 1995.

16. Regarding Apollo's contention that the rate in Transmittal 909 is not a "reasonable market rent," we note that Apollo also raised this issue before the state court of California. GTECA subsequently filed a petition for declaratory ruling in which it urged the Commission to pre-empt the California state court proceeding. Apollo opposed GTECA's petition. We will consider GTECA's petition in a separate Order. Therefore, we will not decide here whether to consider this issue or to defer to the California court. If we determine that pre-emption is appropriate and that pre-emption necessitates designating additional issues in this investigation, we will do so in the separate Order in which we consider GTECA's petition for declaratory ruling.

B. Common Carriage

17. Pleadings. Apollo argues that the service in Transmittal 874 is a private service, not a common carrier service, and that tariffs offering a private service are not lawful. Apollo contends that under the terms of both the contract and the tariff, the offering would be limited to Service Corp., rather than held out generally to the public.⁴⁹ GTECA responds that the Commission has found in the past that video channel service is a common carrier service, properly offered pursuant to tariff.⁵⁰ GTECA also argues that there is nothing that prohibits LECs from filing individually negotiated rates in tariffs.⁵¹

18. Discussion. Apollo also raised this issue with respect to Transmittal 873.⁵² GTECA later removed language from Transmittal No. 873 which limited the offering to one customer, and made the offering generally available.⁵³ We concluded in the Cerritos Tariff Order that, as revised, Transmittal 873 was not so patently unlawful as to warrant rejection, and that an investigation of this issue was not warranted at that time.⁵⁴ On October 7, 1994, GTOC filed Transmittal No. 918, to remove language from Transmittal No. 909 which limited the offering to one customer, and to make the offering generally available. Those revisions are

⁴⁹ Apollo Petition at 14-16, cited in City Petition at 20-21.

⁵⁰ GTECA Opposition at 9-11, citing Ohio Bell Telephone Co., 1 FCC Rcd 942 (Com. Car. Bur. 1986); Pacific Bell Telephone Co. 60 Rad.Reg.2d 1175 (Com. Car. Bur. 1986); C&P Telephone Co., 60 Rad.Reg.2d 1003 (Com. Car. Bur. 1985); Commission Order, Dated April 6, 1966, Requiring Common Carriers To File Tariffs With Commission for Local Distribution Channels for Use in CATV Systems, 4 FCC 2d 257 (1966); General Telephone Company of California, Docket No. 17333, 13 FCC 2d 448 (1968).

⁵¹ GTECA Opposition at 10.

⁵² Cerritos Tariff Order, 9 FCC Rcd at 3617 (para. 31).

⁵³ Id. at 3617-18 (para. 32).

⁵⁴ Id. at 3618 (para. 33).

substantially similar to the revisions GTECA made to Transmittal 873 prior to the release of the Cerritos Tariff Order. Accordingly, we conclude that, as revised, Transmittal 909 is not so patently unlawful as to warrant rejection, and that an investigation of this issue is not warranted at this time. Accordingly, we will not designate this as an issue for investigation.⁵⁵

C. Improper Transfer of Assets

19. Pleadings. In its petition to reject or suspend and investigate Transmittals 873 and 874, MCI argued that GTECA's transfer of investment from nonregulated to regulated accounts did not comply with Section 32.27 of the Commission's Rules.⁵⁶ MCI also observed that the Commission placed several conditions on the cross-ownership waiver granted to GTECA in 1989, one of which was a prohibition against imposing any of the costs associated with providing cable transmission service to Service Corp. on other ratepayers.⁵⁷ Because of this, MCI argues that the investment associated with the portion of the Cerritos cable network used by Service Corp. should remain in nonregulated accounts, and that at most 50 percent should be booked to regulated accounts.⁵⁸ GTECA argues that the transfer of all cable investment to regulated accounts is reasonable, because GTECA's two customers for this service will use 100 percent of the network.⁵⁹

⁵⁵ On August 1, 1994, Apollo filed an application for review of the Cerritos Tariff Order to the extent it did not reject or suspend and investigate Transmittal 873 on the basis of the common carriage issue raised in its petition to reject or suspend and investigate Transmittal 873. Apollo also asserts that the tariff revisions GTECA made to Transmittal 873 were not sufficient to make GTECA's video channel service a common carrier offering. Apollo's arguments are equally applicable to Transmittal 918. Apollo Application at 6-15. No oppositions or replies were filed. Accordingly, we will consider this issue with respect to Transmittal 918, as well as all other issues Apollo raises in its application for review, and issues raised in other applications for review of the Cerritos Tariff Order, in the Order in which we will terminate this investigation.

⁵⁶ See Cerritos Tariff Order, 9 FCC Rcd at 3616 (para. 21). Shortly thereafter, GTECA petitioned for waiver of Sections 32.23, 32.27, 64.901, and 64.902 of the Commission's Rules to transfer investment associated with the Cerritos cable facilities from nonregulated to regulated accounts. We incorporated GTECA's waiver request into this investigation. Cerritos Tariff Order, 9 FCC Rcd at 3618 (Factual Issue 1).

⁵⁷ MCI Petition at 8-9, citing Waiver Review Order, 4 FCC Rcd at 5700-01.

⁵⁸ MCI Petition at 8-9.

⁵⁹ Cerritos Tariff Order, 9 FCC Rcd at 3616 (para. 22); GTECA Opposition at 21.

20. Discussion. In the Cerritos Tariff Order, we designated an issue for investigation regarding GTECA's investment transfer.⁶⁰ We believe the issue as designated is broad enough to encompass both Transmittal 873 and Transmittal 909. Accordingly, we conclude that there is no need to designate any additional issues on this subject.⁶¹ Since MCI's comments are relevant to the asset transfer issue, they will be considered in resolving that issue as it applies to Transmittal 909. In addition, the parties remain free to supplement the record on this issue if they so choose.

D. Unreasonably Low Rates

21. Pleadings. Apollo maintains that GTECA underestimates its maintenance costs by about \$185,000 per year.⁶² GTECA contends that Apollo's claim is based on an incorrect comparison. GTECA states that its charges for maintenance under the contract included nonregulated investment and a rate of return. According to GTECA, it is incorrect to compare those contract maintenance charges with the costs it incurs to provide tariffed maintenance services, as those costs were specified in its cost support accompanying its tariff filing. GTECA contends the maintenance cost in its cost support excludes nonregulated investment and the rate of return.⁶³

22. Apollo further asserts that the rates Service Corp. would pay to GTECA for cable transmission service under Transmittal 874 are much higher than the revenues Service Corp. can expect from its cable programming services, with the result that Service Corp. will provide its cable programming services at a loss. Based on this assertion, Apollo contends that Transmittal 874 will result in cross-subsidization of Service Corp.'s programming services by non-competitive services offered by GTECA.⁶⁴ GTECA claims that as long as Service Corp. pays its bills to GTECA, stockholders rather than ratepayers will bear any risk of loss, and GTECA will not cross-subsidize Service Corp.'s programming services.⁶⁵

23. Discussion. We find GTECA's explanation for its maintenance costs to be reasonable, and we conclude that an investigation of this issue is not warranted at this time. With regard to the cross-subsidization and predation issues raised by Apollo, we note that

⁶⁰ Cerritos Tariff Order, 9 FCC Rcd at 3618 (Factual Issue 1).

⁶¹ We may, however, decide to issue a data request at a later date to collect more information on this issue.

⁶² Apollo Opposition at 21.

⁶³ GTECA Opposition at 16.

⁶⁴ Apollo Petition at 21-24, cited in City Petition at 19.

⁶⁵ GTECA Opposition at 21-22.

Sections 64.901 and 64.903 of the Commission's rules, 47 C.F.R. §§ 64.901, 64.903, prescribe how carriers must allocate their costs and revenues between their regulated, monopoly services and their unregulated, competitive services. Those rules are designed to prevent a carrier from cross-subsidizing its competitive services by recovering costs incurred in providing competitive services by means of revenues collected from customers of its monopoly services. Thus, these rules are designed to prevent the possibility of cross-subsidization which concerns Apollo. Furthermore, we have also reviewed the cost support material provided with Transmittal 874, and conclude that GTECA has shown that its revenues will exceed its costs for this service, thus greatly reducing the likelihood of predatory pricing.⁶⁶ Apollo has not provided any reason for us to conclude that our rules will not be effective here in preventing cross-subsidization or predation. Without such a showing, we conclude that Transmittal 909 is not so patently unlawful as to warrant rejection, and that an investigation of this issue is not warranted at this time.

E. Duplication of Facilities

24. Pleadings. Apollo asserts that permitting both Service Corp. and Apollo to provide cable service in Cerritos would result in wasteful duplication of some elements of cable service, such as provision of converter boxes and billing and collection activities.⁶⁷ Apollo estimates that this duplication could result in a 20 percent increase in cable rates in Cerritos, based on FCC Form 1220, developed by the Commission for cable companies to report costs.⁶⁸

25. GTECA alleges that the tariff will not result in any duplication of maintenance, repair, or installation costs, and asserts that Apollo's costs should be reduced when GTECA

⁶⁶ Courts have defined predatory pricing as pricing below some relevant measure of cost, in order to drive competitors from the market. See e.g., *Southern Pacific Communications Co. v. American Telephone and Telegraph Co.*, 740 F.2d 980, 1002-05 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985); citing Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697 (1975); cited in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 584 n.8 (1986). Previously, the Commission has concluded that requiring the price of a service to exceed the service's direct costs will prevent predatory pricing. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 7 FCC Rcd 5235, 5237 (para. 12) (1992) (Second ONA Reconsideration Order); recon. denied, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 10 FCC 1570 (1994) (Third ONA Reconsideration Order).

⁶⁷ Apollo Petition at 5-6, cited in City Petition at 17-18.

⁶⁸ Apollo Petition at 25-26 and Att. 4, cited in City Petition at 16-17.

assumes these functions.⁶⁹ GTECA asserts that the illustrative Form 1220 submitted by Apollo does not include all of the Worksheets required by the Commission, and hence may not represent the effect on cable rates accurately.⁷⁰ GTECA further contends that since its cable network was designed to accommodate two programmers, no wasteful or inefficient duplication would occur when Apollo and Service Corp. provide their programming services using transmission service provided under GTECA's tariff.⁷¹ GTECA argues that it will perform all installation of new cable drops for both Apollo and Service Corp.⁷² GTECA states that it has never provided billing for video programming services for either Apollo or Service Corp., and will not under the tariff. GTECA also asserts that Service Corp. has the right under the contract to terminate its billing agreement with Apollo at any time.⁷³ GTECA notes that subscribers currently receive programming from both Apollo and Service Corp. through a single converter box.⁷⁴

26. Discussion. Neither converter boxes nor billing and collection services may be provided under tariff. GTECA's Transmittal 909 does not include those offerings as tariffed service elements. Therefore, duplication of converter boxes and billing services are not issues which should be considered in the context of this tariff investigation. In any case, even if Service Corp.'s provision of video programming services resulted in duplication of video programming services, as Apollo suggests, this would not require us to find that GTECA's tariffed video channel service is unreasonable. The reasonableness of a tariff is generally not related to the customer's usage of that service. Accordingly, we do not designate any issues on this subject.

IV. FACTUAL ISSUE DESIGNATED FOR INVESTIGATION

27. In addition to the factual issues raised by Transmittal 873 designated for investigation in paragraph 35 of the Cerritos Tariff Order, we designate the following factual issue raised by Transmittal 909:

Are the rates and terms proposed in Transmittal 909 reasonable?

As explained above, the rates in Transmittal 909 are based on an interest rate of 18.9 percent. GTECA is directed, and other interested parties are invited, to discuss whether such

⁶⁹ GTECA Opposition at 18-19.

⁷⁰ GTECA Opposition at 19-20.

⁷¹ GTECA Opposition at 25-26.

⁷² GTECA Opposition at 26.

⁷³ GTECA Opposition at 27.

⁷⁴ GTECA Opposition at 27-28.

a rate computation is reasonable. Parties may incorporate by reference their responses to Factual Issue 2 designated in the Cerritos Tariff Order.

GTECA is also directed to show either that there is no disparity between the rates in Transmittal 909 and the rates in Transmittal 873 after it has made the appropriate adjustment for the reasonable below-the-line, pre-tax cost of capital, or to explain why any rate disparity is reasonable. Interested parties are invited to comment on GTECA's showings.

V. PROCEDURAL MATTERS

A. Filing Schedules

28. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. In that case, we will require GTOC to file a supplemental direct case addressing the issue designated above no later than **August 28, 1995**. Moreover, the supplemental direct case must supply all information upon which GTOC relies to support its position. Pleadings responding to the supplemental direct case may be filed no later than **September 11, 1995**, and must be captioned "Supplemental Opposition" or "Supplemental Comments." GTOC may file a "Supplemental Rebuttal" to oppositions or comments no later than **September 18, 1995**.

29. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554, and one copy must be delivered to Accounting and Audits Division, Room 812, 2000 L Street, N.W., Washington D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

30. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the order.

B. Ex Parte Requirements

31. Ex parte contacts (i.e., written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in

this proceeding) are permitted in this proceeding until the commencement of the Sunshine Agenda period. The Sunshine Agenda period terminates when a final order is released and the final order itself is issued. Written ex parte contacts and memoranda summarizing oral ex parte contacts must be filed on the day of the presentation with the Secretary and Commission employees receiving each presentation. For other requirements, see generally Section 1.1200 et seq. of the Commission's Rules, 47 C.F.R. §§ 1.1200 et seq.

VI. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, that the GTE Telephone Operating Companies **ARE GRANTED** interim authority to provide video channel service to GTE Service Corporation during the pendency of its permanent Section 214 application.

33. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issue set forth in Section IV of this Order IS DESIGNATED FOR INVESTIGATION.

34. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL BE a party to this proceeding.

35. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL INCLUDE a response to each item of information requested in this Order.

36. IT IS FURTHER ORDERED that this Order shall become effective on the date of its adoption.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau